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No. 93-829

In the Supreme Court of the United States

OCTOBER TERM, 1993

INTEL CORPORATION,
Petitioner,

vs.

ULSI SYSTEM TECHNOLOGY, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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RULE 29.1 STATEMENT

Respondent ULSI System Technology Inc. has no parent company and no subsidiaries.

TABLE OF CONTENTS

Page

Table of Authorities iii

Introduction 1

Statement of the Case 3

Reasons for Denying the Writ 5

1. The Federal Circuit's Decision is Fact-Specific, and is Unlikely to Have a Significant Impact on Existing or Future Commercial Relationships 5

2. The Federal Circuit's Decision is Fully Consistent with This Court's Long-Settled Patent Exhaustion Doctrine 8

TABLE OF AUTHORITIES

CASES

Page

Adams v. Burke, 84 U.S. 453 (1873) 8

Cyrix Corp. v. Intel Corp., 803 F. Supp. 1200 (E.D. Tex. 1992), appeal filed, No. 93-1573 (Fed. Cir.) 5, 10

Deepsouth Packing Co. v. Laitram Corp., 406 U.S. 518 (1972) 10, 11

Harshberger v. Tarrson, 87 F. Supp. 43 (N.D. Ill. 1949), aff'd, 184 F.2d 628 (7th Cir. 1950) 11

Intel v. ITC, 946 F.2d 821 (Fed. Cir. 1991) 2, 4, 6, 7, 10

Paper Converting Mach. Co. v. Magna-Graphics Corp., 745 F.2d 11 (Fed. Cir. 1984) 11

Planned Parenthood v. Casey, 112 S. Ct. 2741 (1992) 12

Unidisco, Inc. v. Schattner, 824 F.2d 965 (Fed. Cir. 1987), cert. denied, 484 U.S. 1042 (1988) 8, 9

United States v. Masonite Corp., 316 U.S. 265 (1942) 12

United States v. Univis Lens Co., 316 U.S. 241 (1942) 8, 9, 10

STATUTES

35 U.S.C. § 271(a) 11

MISCELLANEOUS

Clark, *Intel Loses Ruling on Patents*, S.F. CHRON., June 15, 1993, at C1 2

Microprocessors: Pent-up demand, ECONOMIST, Nov. 13, 1993, at 100..... 3

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

INTRODUCTION

Although Intel labors to inflate the significance of this case, nothing in Intel's petition can obscure the highly fact-specific nature, narrow scope, or legal correctness of the decision below. Reduced to its essence, this case is about a drafting choice made by Intel — a multi-billion dollar semiconductor goliath. After entering into a broad patent cross-license with Hewlett Packard ("HP") and reaping the numerous benefits of that agreement, Intel now is displeased with the pro-competitive results of its contract, and it seeks this Court's review to avoid the consequences of its own drafting decision.

The petition offers two arguments for review. First, Intel contends that the opinion below will have broad negative consequences for the semiconductor industry because the decision supposedly permits all cross-licensees to manufacture and sell

products designed by third-party customers. Second, Intel urges that this Court should alter the long-settled patent exhaustion doctrine by holding that a "first sale" requires not only that the seller transfer an article but also that the seller own the intellectual property rights ("design") of the invention embodied in that article. Intel is wrong on both counts.

As written, the Federal Circuit's decision in this case is appropriately narrow and is therefore of limited commercial and legal significance. The opinion below is closely tied to the language of the agreements in this case. Thus, the ruling will have virtually no effect on *future* patent cross-license agreements because — as Intel candidly admits — parties can "contract around this decision," Pet. 17 (emphasis omitted), simply by providing that licensees may sell only products of their own design to third party customers. Nor will the decision significantly impact conduct under *existing* cross-licenses because there is no evidence that the Intel/HP contract at issue here is broadly (or even narrowly) representative of current patent cross-licenses throughout the semiconductor industry. To the contrary, the Federal Circuit's recent decision in *Intel v. ITC*, 946 F.2d 821 (Fed. Cir. 1991), demonstrates clearly that even some of Intel's *own* existing cross-licenses contain provisions specifically anticipating and prohibiting the precise transaction which gave rise to this case. The ruling below therefore is most accurately viewed as enforcing the precise terms of a specific contract that Intel now wishes it had drafted differently. Such a ruling does not warrant a grant of certiorari.[1]

Neither does the Federal Circuit's decision justify modification by this Court of the long-established patent exhaustion doctrine.

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[1] Indeed, the decision below is an exceptionally poor candidate for review because it was issued following a motion for a preliminary injunction, and is not based on a full record developed in a trial on the merits. Moreover, Intel and ULSI have already entered into a settlement concerning the underlying patent infringement allegations in this case. Accordingly, the parties here have very little at stake because a decision by this Court in either party's favor would affect only the amount of the royalty that ULSI already has agreed to pay Intel. *See* Clark, *Intel Loses Ruling on Patents*, S.F. CHRON., June 15, 1993, at C1.

Intel's self-serving theory that a seller must own the "design" of the article sold in order to constitute a "first sale" is wholly unprecedented. The absence of authority for this position is no accident: such a rule would merely exalt form over substance. Intel's theory might, of course, be beneficial to Intel in this one case, but it hardly would prevent the type of transaction about which Intel complains; indeed, under Intel's proposed rule, HP and ULSI could accomplish the very transaction at issue here simply by having ULSI transfer ownership of its "design" to HP in exchange for an exclusive distribution contract.

Intel's proposal, however, is not just easy to circumvent — it is also a bad idea. Requiring that the seller own the "design" of articles sold would frustrate the commercial certainty present under the existing, common sense patent exhaustion rule. Intel's position, if adopted, would open a veritable Pandora's box of new litigation concerning what constitutes a "design" and what it means for a seller to "own" such a design. Accordingly, this Court should decline Intel's invitation to use this easy case to make bad law.

STATEMENT OF THE CASE

This commercial dispute between Intel and ULSI — two semiconductor corporations — concerns the proper interpretation of the specific provisions of two contracts. The first contract is an extremely broad patent cross-license between Intel and HP (another high technology manufacturer), executed in 1983. Under that agreement, HP and Intel granted each other an "irrevocable, retroactive, nonexclusive, worldwide, royalty-free license" for all patents and patent applications filed prior to January 1, 2000. In return for its part in the cross-license, Intel received the dual benefits of access to HP's enormous patent portfolio and reduced exposure to patent litigation.[2]

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[2] These benefits helped fuel Intel's growth from a small concern into the market-dominating giant that it is today. *See Microprocessors: Pent-up demand*, ECONOMIST, Nov. 13, 1993, at 100 (Intel is the world's largest semiconductor corporation).

Six years later, HP entered into the second contract at issue in this case — a foundry agreement with ULSI. This agreement provided that HP would manufacture and then sell to ULSI certain ULSI-designed computer chips. Faced with the resulting new competition, Intel sought to narrow the effective scope of its earlier patent cross-license with HP by bringing this action against ULSI (HP's customer), alleging that the chips manufactured under the HP/ULSI agreement infringed an Intel patent.

The district court, concentrating almost exclusively on technical issues of infringement, mistakenly granted Intel a preliminary injunction. After careful review of the Intel/HP and HP/ULSI contracts, however, the Federal Circuit reversed.

Focusing first on the language of the HP/ULSI contract, the Federal Circuit concluded that the agreement "clearly involved the sale of chips, not merely the sale of fabrication services." 995 F.2d 1566, 1569, 7a. The court rejected Intel's novel argument that HP could not "sell" ULSI the manufactured chips because ULSI had retained intellectual property rights in the "design" of those chips. "Who designed the chip," the court reasoned, has "no bearing on the controlling issue whether [there was a sale]." *Id.* Accordingly, under the terms of the HP/ULSI license, the court found that the chips "were sold by HP to ULSI." *Id.* Noting the well-settled rule of patent exhaustion that "an authorized sale [by a licensee] of a patented product places that product beyond the reach of the patent," *id.* at 1568, 6a (citation omitted), the Federal Circuit concluded that HP's sale of the chips to ULSI "extinguished Intel's patent rights relating to those products." *Id.* at 1569, 7a.

Turning its attention next to the Intel/HP cross license, the court found no provisions in that contract prohibiting the HP/ULSI transaction. Indeed, the court specifically contrasted the Intel/HP agreement with a similar Intel patent cross-license in *Intel v. ITC*, 946 F.2d 821 (Fed. Cir. 1991), which had included an explicit restrictive provision. 995 F.2d at 1570, 9a-10a. Accordingly, the Federal Circuit held that HP was authorized under the Intel/HP agreement to serve as ULSI's foundry. Thus rejecting Intel's infringement claim, the court trenchantly observed that

> [w]hile Intel may not in retrospect be pleased with the deal that it made permitting HP to make unrestricted sales, it nevertheless granted HP that right in 1983, presumably for consideration it believed to be of value at that time. It cannot now renege on that grant to avoid its consequences.

Id. at 1569, 8a.

REASONS FOR DENYING THE WRIT

1. THE FEDERAL CIRCUIT'S DECISION IS FACT-SPECIFIC, AND IS UNLIKELY TO HAVE A SIGNIFICANT IMPACT ON EXISTING OR FUTURE COMMERCIAL RELATIONSHIPS

Despite Intel's protestations to the contrary, the opinion below neither announces a new rule of law nor purports to resolve in general the permissibility of the foundry transaction at issue in this case. Instead, the Federal Circuit's decision simply interprets the particular language of the contracts between Intel, HP, and ULSI, holding — as a matter of contract law — that chips were sold under the HP/ULSI contract and that the Intel/HP cross-license contained no limitations prohibiting the HP/ULSI foundry agreement.

Indeed, the court below could hardly have been clearer in highlighting the fact-specific nature of this case, writing that "if the license had been limited in some relevant way, that would be a *different case* from the one before us." 995 F.2d at 1569, 8a (emphasis added). Thus, the panel found that while Intel might have contractually "retained its right to proceed against those who entered into foundry agreements such as the present one," Intel had in this case failed to do so. *Id.*

At the time of the Intel/HP agreement, Intel was well aware that licensees might serve as foundries for their customers' products. Indeed, Intel itself has "engaged in its own foundry activities with other companies . . . pursuant to which Intel agreed to make and sell integrated circuits wafers or dice that had been designed by those [other] companies." *Cyrix Corp. v. Intel Corp.*, 803 F. Supp. 1200, 1204 (E.D. Tex. 1992), *appeal filed*, No. 93-

1573 (Fed. Cir.) Therefore, Intel's decision to omit any limitations concerning foundry arrangements from the Intel/HP contract was a deliberate choice. Having garnered a decade's worth of benefits under the contract — including access to HP's broad patent portfolio and freedom from litigation with HP — Intel now seeks to rewrite the Intel/HP cross-license.

In order to justify review of the narrow decision below, Intel insists that the Federal Circuit's ruling is of substantial commercial significance. Yet Intel itself concedes that "*future* cross-licenses might explicitly preclude" the HP/ULSI transaction at issue in this case. Pet. 11 (emphasis added). Nevertheless, in a whirlwind of hyperbole, Intel contends that the Federal Circuit's ruling will have dire consequences not only for the entire semiconductor industry but also for the American economy at large.[3]

The unspoken premise of Intel's argument, of course, is that all (or at least most) *existing* patent cross-license contracts — both inside and outside the semiconductor industry — are identical to the HP/Intel agreement in this case. This premise remains unspoken, however, because Intel has not presented a scintilla of evidence that the precise terms of the Intel/HP contract are common to many, or any, other existing patent cross-licenses.

To the contrary, the information available demonstrates that even Intel's own patent cross-licenses often differ from the Intel/HP agreement here, and that straightforward differences in contractual language may result in different outcomes. In *Intel v. ITC*, 946 F.2d 821 (Fed. Cir. 1991) [hereinafter "*Atmel*"], the Federal Circuit specifically addressed the question presented in this case. The *Atmel* court, however, reached the opposite result solely because the Intel cross-license there at issue contained a

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[3] Intel also asserts, without citation to *any* authority, that the opinion below will "exacerbate the trend to send manufacturing jobs overseas." Pet. 16. Because the Federal Circuit's decision is quite narrow, it likely will have little effect in either direction on the domestic job market. Nevertheless, the only facts available concerning the impact of the ruling below — namely, the facts of this case — suggest just the *opposite* of Intel's argument: the HP/ULSI foundry agreement provided manufacturing work for HP's American employees.

simple limitation not included by the parties in the Intel/HP cross-license in this case.

The parallels between *Atmel* and this case are striking. As here, Intel had entered into a "world-wide, royalty-free" patent cross-license with another chipmaker (Sanyo). *Id.* at 828. As here, a third party customer (Atmel) designed a computer chip and engaged the Intel cross-licensee (Sanyo) to manufacture the chip. And as here, Intel then sued the customer, alleging patent infringement, and the customer responded by arguing that it was immune from infringement liability because it had purchased the allegedly infringing chips from an Intel licensee.

In *Atmel,* however, the Federal Circuit ruled in Intel's favor, holding that the customer was *not* immune from infringement liability because the Intel/Sanyo contract only permitted Sanyo to include and sell Intel's patented inventions in "any Sanyo . . . product." *Id.* at 826 (internal quotation marks omitted). This single, straightforward contractual limitation made all the difference, and the license was "properly construed to cover only Sanyo designed and manufactured products and to exclude parts designed by others." *Id.* at 828. Thus, the *Atmel* court, as a matter of contract interpretation, concluded that the cross-license in that case "preclude[d] the . . . foundry manufacture by Sanyo of [a customer-designed chip]." *Id.*

In contrast, "the licensing agreement between Intel and HP here contains no restriction on HP's right to sell or serve as a foundry." 995 F.2d at 1570, 10a. Accordingly, the Federal Circuit in this case read the Intel/HP cross-license to permit HP's manufacture and sale of products designed by ULSI. Taken together then, the Federal Circuit's decisions in *Atmel* and this case illustrate that the appropriateness of a particular foundry arrangement, such as the HP/USLI agreement, is a fact-specific matter depending on the precise wording of a given patent cross-license. Thus, the narrow decision below is manifestly inappropriate for this Court's review.

2. THE FEDERAL CIRCUIT'S DECISION IS FULLY CONSISTENT WITH THIS COURT'S LONG-SETTLED PATENT EXHAUSTION DOCTRINE

For well over a century, it has been settled law that when a patentee "sells a [patented] machine or instrument" for consideration, that machine or instrument "passes without the limit of the monopoly." *Adams v. Burke,* 84 U.S. 453, 456 (1873). This patent exhaustion doctrine exists "to give effect to the public policy which limits the granted monopoly strictly to the terms of the statutory grant." *United States v. Univis Lens Co.,* 316 U.S. 241, 250 (1942). Indeed, this Court's decisions uniformly have recognized that

> the purpose of the patent law is fulfilled with respect to any particular article when the patentee has received his reward for the use of his invention by the sale of the article, and that once that purpose is realized the patent law affords no basis for restraining the use and enjoyment of the thing sold.

Id.

This same longstanding patent exhaustion doctrine applies to the authorized sale of a patented article by a licensee. 995 F.2d at 1568, 6a; *see also Unidisco, Inc. v. Schattner,* 824 F.2d 965, 968 (Fed. Cir. 1987), *cert. denied*, 484 U.S. 1042 (1988). Thus, the court below found that, by signing the Intel/HP cross-license and thereby receiving the many benefits of that agreement, Intel had received its just reward for the invention at issue in this case. The Federal Circuit then closely examined the terms of the HP/ULSI contract and determined as a matter of contract law that "the agreement clearly involved sale of chips" embodying Intel's patented invention. 995 F.2d at 1569, 7a. Accordingly, the sale of those chips "by HP to ULSI . . . extinguished Intel's patent rights relating to those products." *Id.*

In seeking review of this straightforward decision, Intel now proposes that this Court effect a dramatic modification of the time-honored patent exhaustion doctrine. Intel argues that the sale of a patented article should not be deemed to exhaust the patentee's monopoly unless the seller (patentee or licensee) owned not only the patented article itself but also the "design" of

that article. Such a rule, however, would be unprecedented, unwarranted, and unwise.[4]

1. There simply is no authority holding that a seller must own intellectual property rights to the "design" embodied in an article in order to make a patent-exhausting sale of that article. To the contrary, this Court clearly has stated that all that is necessary to invoke the patent exhaustion doctrine is "the sale of an *article* embodying the invention." *Univis Lens*, 316 U.S. at 250 (emphasis added). When a licensee makes an authorized sale, that sale "exhausts the monopoly *in that article* and the patentee may not

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[4] Intel also contends that its patent monopoly was not exhausted by the HP/ULSI transaction because HP did not "own" the computer chips it transferred to ULSI, or alternatively, because HP sold only manufacturing "services" under the HP/ULSI contract. Pet. 24-25. These arguments, however, are directed solely at the Federal Circuit's interpretation of the particular language of the HP/ULSI contract. That interpretation clearly was correct given that the HP/ULSI contract "recite[d] prices for the chips and include[d] a delivery schedule for shipments of the chips to ULSI" and was "replete with references to the sale of semiconductor wafers." 995 F.2d at 1569, 7a (emphasis added). Moreover, Intel simply is wrong in suggesting that HP did not "own" the chips: if ULSI had refused to pay HP the agreed-upon price for those products, HP would have been entitled to (and would have) kept the chips for itself. *See* C.A. App. A49 ("Should Buyer become delinquent in the payment of any sum due hereunder, HP shall not be obligated to continue performance.") Whether or not HP would then have been free to sell those chips to another buyer is irrelevant. *See Unidisco*, 824 F.2d at 968 (transfer of ownership constitutes patent-exhausting sale despite seller's agreement to sell exclusively to single buyer). HP owned the chips until ULSI paid for them, and HP's transfer of those chips to ULSI in return for monetary remuneration therefore constituted a sale. In any event, Intel's arguments about "ownership" and "services" are matters concerning the interpretation of a single contract, are wholly independent of the proper construction of the patent exhaustion doctrine, and therefore do not warrant review by this Court.

thereafter, by virtue of his patent, control the use or disposition *of the article." Id.* (emphasis added).[5]

Thus, Intel's argument reduces to a request that this Court reconsider the time-honored patent exhaustion rule most recently reaffirmed in *Univis Lens*, solely for the purpose of expanding the ambit of Intel's monopoly. But this Court "[does] not [lightly] expand patent rights by overruling or modifying [its] prior cases." *Deepsouth Packing Co. v. Laitram Corp.*, 406 U.S. 518, 531 (1972). Instead, this Court consistently has required

> a clear and certain signal from Congress before approving the position of a litigant who . . . argues that the beachhead of privilege is wider, and the area of public use narrower, than courts had previously thought.

Id. As in *Deepsouth*, "[n]o such signal legitimizes [Intel's] position in this litigation." *Id.*

Moreover, there is nothing about the factual circumstances of this case requiring a revision of this Court's long-settled rule. In fact, the "Federal Circuit has consistently applied the Patent Exhaustion Doctrine in a variety of contexts, including situations involving foundry relationships in which a foundry manufactures products to a customer's design." *Cyrix*, 803 F. Supp. at 1213. In *Atmel*, for example, the Federal Circuit considered a foundry relationship similar to the HP/ULSI contract in this case and held that where an agreement

> permits [a licensee] to act as a foundry for another company for products covered by the Intel patents, the purchaser of those licensed products from [the licensee] would be free to use and/or resell the products.

946 F.2d at 826.[6]

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[5] "Intel does not dispute that HP was authorized under the broad terms of the [Intel/HP] licensing agreement to sell the chips at issue." 995 F.2d at 1569, 7a.

[6] *See also Cyrix*, 803 F. Supp. at 1214 ("An authorized sale of a patented product exhausts the patent monopoly as to that product.")

Indeed, "a conventional sale is not required to trigger patent exhaustion." *Id. Any* transfer of ownership places the article transferred beyond

Accordingly, the Federal Circuit ruled that Intel's argument "confuses the issue of design origin with the issue of sale." 995 F.2d at 1569, 7a. Whether HP or ULSI owned the "design" etched into the computer chips at issue has "no bearing on the controlling issue whether the [chips] were sold by HP to ULSI and thus extinguished Intel's patent rights relating to those products." *Id.*

2. Not only is Intel's theory unprecedented, it also is an impermissible and ineffectual attempt to regulate form rather than substance. Adoption of Intel's view that a seller must own both the article and the "design" embodied in that article in order to make a patent-exhausting sale would not prohibit transactions identical in substance to the sale at issue in this case. Instead, under Intel's alternative formulation of the patent exhaustion doctrine, form would be outcome-determinative. Parties wishing to replicate the HP/ULSI transaction could simply contract for the customer (ULSI) to transfer ownership of its "design" to the licensed foundry (HP) in return for an exclusive distribution contract. Alternatively, the customer could license its "design" to the foundry for the purpose of manufacturing the desired article.[7] In either event, the foundry would own rights to the "design" and

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the reach of the patent statute. *See id.; Harshberger v. Tarrson,* 87 F. Supp. 43, 45-46 (N.D. Ill. 1949), *aff'd,* 184 F.2d F.2d 628 (7th Cir. 1950) (patentee's monopoly ended once an article embodying the patented invention was made and "disposed of" to a third party, even though the article was transferred as a result of a security pledge rather than by a sale.)

[7] The mere act of transferring a "design", whether or not for consideration, would not in itself constitute patent infringement. *See* 35 U.S.C. § 271(a); *Deepsouth,* 406 U.S. at 528 ("[P]atent protects only against the operable assembly of the whole"); *see also Paper Converting Mach. Co. v. Magna-Graphics Corp.,* 745 F.2d 11, 16 (Fed. Cir. 1984) (Patentee may "prevent anyone from making, selling, or using a structure embodying the invention, but the monopoly goes no further than that.") Thus, because ULSI could have transferred ownership of or licensed its "design" (a magnetic tape) to HP without "making, using, or selling" any portion of the patented invention (a computer chip), ULSI could have completed such a transfer or license without infringing Intel's patent.

could — by Intel's own reasoning — sell articles embodying that design to the customer free of the patentee's monopoly.

Intel's theory thus is the ultimate elevation of form over substance, and "[t]his Court has quite consistently refused to allow the form into which the parties chose to cast the transaction to govern." *United States v. Masonite Corp.*, 316 U.S. 265, 276 (1942). Moreover, because parties could easily circumvent Intel's rule, that rule would do little more than resolve this single case.

3. Finally, adoption of Intel's novel theory would complicate enormously the heretofore straightforward patent exhaustion doctrine. Under existing, well-settled law, a court need only determine whether an authorized licensee sold a customer an article embodying a patented invention. Intel's theory, however, would require the courts to define the "design" of each article and then to determine who "owns" that design. Such a regime would raise a plethora of new questions. What is the "design" of a complex product consisting of multiple intellectual property components? Who owns the design if the customer and the patent licensee create the design as a joint venture? Who owns the design if the customer licenses its own design to the patent licensee? If the customer pays the patent licensee to develop a design, would the patent licensee then own the design? If so, why should the result be different if the customer simply pays its own employees to develop the design in the first instance? All of these unresolved questions would undermine existing certainty and would frustrate parties' ability to contract effectively. *Cf. Planned Parenthood v. Casey*, 112 S. Ct. 2791, 2803 (1992) ("Liberty finds no refuge in a jurisprudence of doubt.")

* * *

In summary, Intel's petition seeks certiorari in order to escape the consequences of its own decision to enter into a broad, unrestricted patent cross-license. Having handsomely benefitted from that cross-license, Intel now attempts to avoid fulfilling its part of the bargain. The Federal Circuit — viewing this matter as a case of contract interpretation — properly rejected this attempt by Intel to modify its own contractual obligations. The court recognized the fact-specific nature of this case and refused to

endorse Intel's entirely unprecedented reformulation of settled patent exhaustion doctrine. The Federal Circuit was correct, and its opinion therefore presents no occasion meriting this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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